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UNITED STATES DISTRICT COURT – SOUTHERN DISTRICT OF
CALIFORNIA

CHAD MCKINNEY, an individual,
Plaintiff,

v.

APOLLO GROUP, INC.,
UNIVERSITY OF PHOENIX, a
Corporation, MECHELLE
BONILLA, an Enrollment Manager
at UNIVERSITY OF PHOENIX,
KYAN FLYNN, Director of
Enrollment at UNIVERSITY OF
PHOENIX, APRIL ALCORN, an
Employees Relations Consultant at
UNIVERSITY OF PHOENIX,
CARLYN LINDSTEN, Associate
Director of Enrollment at
UNIVERSITY OF PHOENIX

Defendants

CASE NO. 07-CV-2373 WQH CAB

**APOLLO GROUP, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS
PLAINTIFF'S COMPLAINT, OR, IN
THE ALTERNATIVE, MOTION
FOR MORE DEFINITE
STATEMENT**

[FRCP 12(b)(6); 12(e).]

Date: October 20, 2008
Time: 11:00 AM
Courtroom: 4
Judge: Hon. William Q. Hayes

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

DATE OF FILING: December 19, 2007

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I.**INTRODUCTION**

Plaintiff Chad McKinney ("McKinney") has brought the instant action against Apollo Group, Inc., (erroneously sued as Apollo Group, Inc., University of Phoenix, a Corporation), an Arizona corporation (hereafter, "Apollo"). The Court should dismiss the Complaint for failure to state a claim upon which relief can be granted. The caption of McKinney's Complaint states that it is "for violation of Federal False Claims Act and for violation of the Civil Rights Act 1964 and the amendments to Title VII of the Civil Rights Act of 1991-Retliation-Wrongful Termination & Employment Discrimination Civil Action" and lists seven causes of action:

1. Retaliation pursuant to the False Claims Act § 3729;
2. Retaliation under Title VII;
3. Wrongful Termination;
4. False Imprisonment;
5. Intentional Infliction of Emotional Distress;
6. Defamation; and
7. Equal Pay.

The Complaint, however, contains no comprehensible recitation of facts or the basis for any of McKinney's purported claims, nor does it give Apollo fair notice of its purported acts or omissions, what actions are attributed to what defendants, how Apollo's conduct damaged McKinney, or even what damage McKinney suffered.

Accordingly, Apollo brings this motion to dismiss McKinney's Complaint pursuant to Rule 12(b)(6) because the Complaint fails to state a claim upon which relief may be granted and fails to comply with FRCP Rule 8. In the alternative, if the Court declines to dismiss the Complaint for failure to state a claim and requires

1 McKinney to re-serve an amended Complaint, Apollo requests that the Court order
2 McKinney to file a more definite statement pursuant to FRCP Rule 12(e).

3 4 II.

5 **THE COURT SHOULD DISMISS THE COMPLAINT BECAUSE IT FAILS** 6 **TO PROVIDE A BASIS UPON WHICH RELIEF CAN BE GRANTED.**

7 **A. The Court May Dismiss Patently Defective Complaints.**

8 A motion to dismiss for failure to state a claim tests the legal sufficiency of
9 the complaint. The Court may dismiss a complaint as a matter of law either for lack
10 of a cognizable theory or the absence of sufficient facts alleged under a cognizable
11 legal theory. *Roberston v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.
12 1984). Thus, the Court should dismiss a claim if “it appears beyond doubt that the
13 plaintiff can prove no set of facts in support of his claim which would entitle him to
14 relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In making this
15 determination, the Court must accept as true all material allegations in the
16 complaint and draw all reasonable inferences in the plaintiff’s favor. *Usher v. City*
17 *of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). While allegations of material
18 fact are taken as true, however, a plaintiff may not rely on conclusory allegations
19 and unwarranted inferences to defeat dismissal. *See e.g., In re Syntex Corp. Sec’s*
20 *Litig.*, 95 F.3d 922, 926 (9th Cir. 1996); *Holden v. Hagoplan*, 978 F.2d 1115, 1121
21 (9th Cir. 1992). Also, the Court does not “assume the truth of legal conclusions
22 merely because they are cast in the form of factual allegations.” *Western Min.*
23 *Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

24 As explained more fully below, this Court should dismiss McKinney’s
25 Complaint because it fails to state a claim upon which relief may be granted.

B. McKinney's Purported Claim Under the False Claims Act (31 U.S.C. § 3729) Provides No Basis Upon Which Relief Can Be Granted.

The Complaint also fails to distinguish among – or even clearly set out – the various claims being alleged. For example, the Complaint mentions an action for retaliation arising under the False Claims Act, 31 U.S.C. § 3729 (“FCA”) in McKinney’s “Statement of the Case” and “Legal Claims,” but no supporting facts even mentioning the FCA can be found in his “Statement of Facts.” [Complaint, 2:9-11; 16:8-19.] In fact, McKinney’s reference the FCA contains the following mystifying statements:

In 1986, Congress added provisions in 31 U.S.C Sec. 3730(h): ‘Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of his employer or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.’

[*Id.*, (emphasis added).]

McKinney does not reference anything he did “in furtherance of *action* under this section.” In fact, McKinney does not provide any supporting facts at all for this claim and instead simply recites a statute that does not apply to him under any circumstances. The FCA’s provisions address an attempt to defraud the government to obtain payment/property by an individual or entity. If proven, then the individual or entity will be liable:

[T]o the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person [...].

31 U.S.C. 3729(a). For an “action” to exist, however, it may only be brought by the Attorney General or by a private person in the name of the United States Government. 31 U.S.C. §§ 3730(a), (b). Moreover, there are special requirements

1 for a private person to bring an action under the FCA that McKinney never did. In
2 pertinent part:

3 **(b) Actions by Private Persons.—**

4 (1) A person may bring a civil action for a violation of
5 section 3729 for the person and for the United States
6 Government. The action shall be brought in the name of
7 the Government. The action may be dismissed only if the
8 court and the Attorney General give written consent to the
9 dismissal and their reasons for consenting.

10 (2) A copy of the complaint and written disclosure of
11 substantially all material evidence and information the
12 person possesses shall be served on the Government
13 pursuant to Rule 4(d)(4) of the Federal Rules of Civil
14 Procedure. The complaint shall be filed in camera, shall
15 remain under seal for at least 60 days, and shall not be
16 served on the defendant until the court so orders. The
17 Government may elect to intervene and proceed with the
18 action within 60 days after it receives both the complaint
19 and the material evidence and information.

20 31 U.S.C. § 3730(b).

21 Furthermore, the FCA bars the following actions:

22 **(e) Certain Actions Barred.—**

23 (3) In no event may a person bring an action under
24 subsection (b) which is based upon allegations or
25 transactions which are the subject of a civil suit or an
26 administrative civil money penalty proceeding in which
27 the Government is already a party.

28 (4)

(A) *No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.*

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based *and* has voluntarily provided the information to the Government *before* filing an action under this section which is based on the information.

1 31 U.S.C. § 3730(e) (emphasis added).

2 McKinney has not provided any facts indicating that he has performed lawful
3 acts in furtherance of an existing “action” under the FCA. Furthermore, McKinney
4 has not provided any facts that demonstrate that an “action” brought by either the
5 Attorney General or in the name of the United States Government even exists.
6 Indeed, it appears that McKinney’s claim under the FCA may be barred since he
7 has not asserted that he is an “original source” of information provided to the
8 United States Government as is required under 31 U.S.C. section 3730(e)(4).

9 Accordingly, McKinney has not properly alleged an action under the FCA
10 upon which relief can be granted.

11
12 **C. McKinney’s Purported Claim Under Title VII of the Civil Rights Act of**
13 **1964 and amendments to Title VII of the Civil Rights Act of 1991 (42**
14 **U.S.C. § 2000e) Provides No Basis Upon Which Relief Can Be Granted.**

15 McKinney’s Complaint similarly fails to state a claim for violation of
16 Title VII of Civil Rights Act, as amended (“Title VII”). McKinney asserts that he
17 suffered “discriminatory behavior” and was retaliated against in violation of
18 Title VII. [Complaint, 2:19-21; 16:20-24.] As with McKinney’s claim under the
19 FCA, the only two references to Title VII are found in the “Statement of the Case”
20 and “Legal Claims” and no supporting facts are found in his “Statement of Facts”.
21 [*Id.*] In fact, it cannot be determined from McKinney’s unintelligible Complaint
22 whether he is alleging disparate treatment, retaliation or both.¹

23 Title VII makes it unlawful for covered employers to hire or discharge any
24 individual, or otherwise discriminate against any individual based on race, color,
25 religion, sex or national origin (“protected class”). 42 U.S.C. § 2000e *et seq.* Yet,

26
27 ¹ It will be assumed that McKinney’s Title VII claim is limited to retaliation since
28 this is what he reported to the EEOC. [Declaration of Nathan W. Hicks In
Support of Apollo’s Motion to Dismiss Plaintiff’s Complaint (“Hicks Decl.”),
Exs. 1 and 2.]

McKinney does not allege that he belongs to a class protected under Title VII. To succeed on a retaliation claim, McKinney must have supporting facts to allege: (1) he engaged in some protected conduct (protected by Title VII); (2) he suffered an adverse employment action; and (3) the adverse employment action was taken against him because of the protected activity. *Trent v. Valley Elect. Assoc.*, 41 F.3d 524, 526 (9th Cir. 1994). McKinney does not aver any supporting facts that support his allegations of retaliation in violation of Title VII.

To establish a *prima facie* case of discriminatory treatment,² McKinney must show supporting facts that: (1) he is a member of a protected class; (2) he was capable of performing his job; and (3) he was treated differently because of his protected class status. *Pejic v. Hughs Helicopters, Inc.*, 840 F.2d 667, 672 (9th Cir. 1988). McKinney has alleged no facts in support of his claim of discrimination in violation of Title VII.

Finally, McKinney was not employed by Apollo, but was rather hired and employed by the University of Phoenix, Inc. ("UOP"). [Complaint, pg. 5, ¶¶ 1 and 2.] For McKinney to have claims that Apollo retaliated or discriminated against him, he must show that Apollo was his employer since "[t]he liability schemes under Title VII...limit civil liability to the employer." *Miller v. Maxwell's International, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993). McKinney has failed to do this.

Accordingly, McKinney has not properly alleged an action against Apollo under Title VII upon which relief can be granted.

² As stated above, if McKinney is alleging discrimination, then he has not exhausted the required administrative remedies in order to properly plead this issue.

D. McKinney's Other Purported Claims Provide No Basis Upon Which Relief Can Be Granted.

Although the Complaint lists seven causes of action³ under the section entitled "Legal Claims," the remainder of the Complaint appears to consist of protracted "cut and paste" language⁴ that is internally inconsistent, ambiguous and fails to provide any support for the purported claims listed in the caption. Instead, McKinney simply lists five other causes of action with no factual support or legal basis.⁵

To the extent McKinney is asserting these or any other claims against Apollo (which is, itself, unclear from the wording of the Complaint), McKinney has failed to describe these claims with any specificity or to set forth the required elements of those claims. Accordingly, Apollo is unable to determine which claims are being alleged against it, and McKinney failed to state any claim upon which relief can be granted.

III.

**THE COURT SHOULD DISMISS THE COMPLAINT
 BECAUSE IT FAILS TO COMPLY WITH FRCP RULE 8.**

FRCP Rule 8 requires a plaintiff to set forth "a short and plain statement of the claim showing that the [plaintiff] is entitled to relief." FRCP Rule 8(a)(2). Similarly, each claim must be "simple, concise, and direct." FRCP Rule 8(e)(2). These rules are designed to ensure that a complaint gives fair notice to defendants and states the elements of the claim plainly and succinctly. *Jones v. Cmty.*

³ None of McKinney's causes of action distinguish what actions are purportedly attributable to what defendant.

⁴ The same language is found in McKinney's EEOC complaint. [Hicks Decl., Exs. 1 and 2.]

⁵ McKinney simply lists: wrongful termination, false imprisonment, intentional infliction of emotional distress, defamation and equal pay under the remaining causes of action without any reference to a legal basis or how these causes of action apply to him.

1 *Redevelopment Agency of the City of Los Angeles*, 733 F.2d 646, 649 (9th Cir.
2 1984).

3 When the complaint is written by a *pro se* litigant, these rules are relaxed and
4 the complaint is held to a less stringent standard. *Eldridge v. Block*, 832 F.2d 1132,
5 1136 (9th Cir. 1987). Nevertheless, if a complaint contains nothing more than
6 conclusory allegations, unsupported by any facts, it fails to state a claim under
7 Rule 8. *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977); se also,
8 *Barsella v. United States*, 135 F.R.D 64, 66 (S.D.N.Y 1991) (policy requiring
9 courts to liberally construe *pro se* complaints “does not mandate that a court system
10 sustain every *pro se* complaint even if it is incoherent, rambling, and unreadable”).
11 Here, McKinney’s complaint is incoherent, rambling, unreadable and fails to
12 comply with Rule 8.

13 The Complaint fails to distinguish among – or even clearly set out – the
14 various claims being alleged.⁶ And, despite containing a heading entitled
15 “Statement of Facts,” the body of the Complaint is prolix, confusing, and in many
16 areas – meaningless. Further, it is not clear what relief McKinney seeks or how the
17 allegations support the relief sought. Indeed, for his last five causes of action,
18 McKinney does not even bother to cite to legal support or provide *any* statement
19 demonstrating that he is entitled to relief. Instead, the Complaint is simply a
20 recitation of disconnected ideas wrapped with conclusory allegations seeking some
21 sort of unintelligible relief. The Complaint, therefore, fails to comply with Rule 8
22 and should be dismissed under FRCP Rule 12(b)(6) for failure to state a claim upon
23 which relief can be granted.

24
25
26
27 ⁶ See Part II above for a further discussion of the deficiencies in McKinney’s
28 claims.

IV.

THE COURT SHOULD DISMISS**MCKINNEY'S COMPLAINT WITH PREJUDICE.**

The factors a court may consider in determining whether to dismiss a complaint with prejudice under FRCP Rule 41(b) include: (1) the plaintiff's status as a pro se litigant; (2) the burden on the defendants and their right to be free from costly and harassing litigation; (3) the burden confusing and prolix complaints place on the court system; (4) the strength of plaintiff's case; and, (5) the feasibility of less drastic alternatives, such as allowing further amendment. *See, e.g., McHenry v. Renne*, 84 F.3d 1172, 1179-1180 (9th Cir. 1996); *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 674-675 (9th Cir. 1981); *Von Poppenheim v. Portland Boxing and Wrestling Commission*, 442 F.2d 1047, 1053 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972). Under the circumstances of this dispute, these factors heavily favor dismissal with prejudice.

McKinney has filed a protracted, rambling, incomprehensible Complaint that utterly fails to allege any facts to support any of his claims, and that is not even clear as to which claims are being asserted, and against which Defendants. McKinney cannot assert anything in an amended pleading that will give merit to his baseless claims. As such, the Court should dismiss McKinney's Complaint with prejudice pursuant to FRCP Rule 41(b).

V.

ALTERNATIVELY, THE COURT SHOULD REQUIRE MCKINNEY TO
FILE A MORE DEFINITE STATEMENT UNDER FRCP RULE 12(e).

If the Court declines to dismiss the Complaint, and either quashes service and requires McKinney to re-serve the Complaint or finds that service of process was sufficient under the FRCP and that the Court has jurisdiction over Apollo, the Court should require McKinney to file a more definite statement.

1 FRCP Rule 12(e) protects defendants from having to guess at the meaning of
2 complaints like the one brought by McKinney:

3 If a pleading to which a responsive pleading is permitted
4 is so vague or ambiguous that a party cannot reasonably
5 be required to frame a responsive pleading, the party may
6 move for a more definite statement before interposing a
7 responsive pleading.

8 FRCP Rule 12(e).

9 A complaint may state a claim for relief, but may still be so vague and
10 ambiguous as to require a plaintiff to provide a more definite statement. *See*
11 *Cellars v. Pacific Coast Packaging, Inc.*, 189 F.R.D. 575, 578 (N.D. Cal. 1981);
12 *Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F. Supp. 940, 949 (E.D. Cal. 1981).
13 When claims, such as those made by McKinney are so indefinite that the defendant
14 cannot ascertain the nature of the claim being asserted, a defendant cannot
15 reasonably be expected to frame a proper response. *Id.*

16 A motion for a more definite statement is appropriate where allegations do
17 not comply with the pleading requirements identified in FRCP Rule 8. 2 James
18 Wm. Moore, et al., *Moore's Federal Practice*, 12.36[1] (3d ed. 2000). Under
19 Rule 8, a pleading must give "fair notice on the grounds for the various claims" and
20 "requires more than empty boilerplate." *Gen-Probe, Inc. v. Amoco Corp.*, 926 F.
21 Supp. 948, 961 (S.D. Cal. 1988); *see also Conley v. Gibson*, 355 U.S. 41, 47
22 (1957). Therefore, if a pleading is not "clear enough to provide the defendant with
23 a sufficient basis to frame a responsive pleading" a more definite statement is
24 appropriate. *Sec. Dynamics Techs., Inc. v. Active Card Networks, Inc.*, No. 95-
25 20870SW, 1996 WL 263648, at *1 (N.D. Cal. May 13, 1996).

26 Here, for the reasons set forth above, McKinney's Complaint is so
27 ambiguous and unintelligible that Apollo cannot reasonably be required to frame a
28 responsive pleading. Therefore, if the Court does not grant Apollo's Rule 12(b)(6)
motion, the Court should order McKinney to file a more definite statement.

VI.

CONCLUSION

For the reasons stated above, Apollo respectfully requests that the Court dismiss McKinney's Complaint with prejudice. In the alternative, if the Court declines to dismiss the Complaint, Apollo respectfully requests that the Court require McKinney to file a more definite statement.

Date: August 29, 2008

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PROOF OF SERVICE**McKinney v. Apollo Group, Inc., et al.
USDC, Southern – Case No. 07-CV-2373**

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

On September 2, 2008, I served, in the manner indicated below, the foregoing document described as **APOLLO GROUP, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT, OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

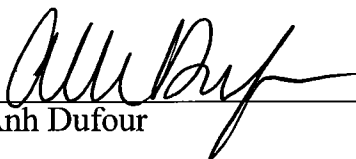
Chad McKinney 6266 Madeline Street, Apt. #61 San Diego, CA 92115	Plaintiff, Pro Se Tel: (619) 634-3566 TRACKING # 797075185540
United States District Court Attention: Hon. Judge William Q. Hayes Courtroom 4 940 Front Street, Room 4290 San Diego, CA 92101-8900	Courtesy Copy Tel: (619) 557-5600 TRACKING # 796076073808

I am employed in the office of a member of the bar of this court at whose direction the service was made.

☒ BY FEDERAL EXPRESS: I caused such envelopes to be delivered by air courier, with next day service, to the offices of the addressees. (C.C.P. § 1013(c)(d)).

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on September 2, 2008, at Costa Mesa, California.


Anh Dufour